



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

JUL 3 2007

Jan W. Baran
Wiley Rein & Fielding LLP
1776 K Street, N.W.
Washington, DC 20006

RE: MUR 5819
U.S. Chamber of Commerce

Dear Mr. Baran:

On October 17, 2006, the Federal Election Commission (the "Commission") notified the United States Chamber of Commerce of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended (the "Act"). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, and information supplied by you, the Commission, on June 28, 2007, found that there is reason to believe the United States Chamber of Commerce violated 2 U.S.C. §§ 441b(a) and 441d(a)(3). The Factual and Legal Analysis, which formed a basis for the Commission's findings, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 30 days of receipt of this letter. Where appropriate, statements should be submitted under oath.

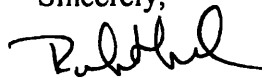
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Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. *See* 18 U.S.C. § 1519.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

If you have any questions, please contact Adam Schwartz, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Robert D. Lenhard
Chairman

Enclosures
Factual and Legal Analysis

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**FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS**

Respondent: United States Chamber of Commerce

MUR: 5819

I. BACKGROUND

This matter arises from a complaint filed by James J. Bickerton and Barry A. Sullivan concerning an automated telephone call made in connection with the 2006 Hawaii Democratic primary election. The U.S. Chamber of Commerce (the "Chamber") is an incorporated non-profit trade association based in Washington, D.C. On September 15, 2006, eight days before the Hawaii Democratic primary election, the Chamber paid for automated telephone calls in Hawaii with the following message:

Hello, I'm calling with an important message for absentee voters about Congressman Ed Case. Ed Case has over twenty years experience in both the public and private sector, and he has fought hard and delivered on his promises while representing us in the US House the past four years. Ed Case supports tax cuts that have helped put more money in the pockets of Hawaii's families. Ed Case also supports Small Business Health Plans, which would give small businesses and the self-employed greater access to affordable health plans. Ed Case has made the tough decisions that are right for Hawaii, even if it's not popular with partisan politicians.

Please visit www.movehawaiiforward.com to learn more. This message was paid for by the U.S. Chamber of Commerce. Thank you.

The complainant refers to one recipient of this message, who was not a member of the Chamber, resides outside of Rep. Case's congressional district, and appears to have been selected because she was a potential absentee voter in Hawaii.

1 **II. DISCUSSION**

2 **a. EXPRESS ADVOCACY**

3 The Act prohibits corporations from making contributions or expenditures in connection
4 with any Federal election. 2 U.S.C. § 441b(a). The Supreme Court held in *FEC v.*
5 *Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) (“*MCFL*”) that a corporate
6 expenditure for a general public communication, if made independent of a candidate and/or his
7 campaign committee, “must constitute ‘express advocacy’ in order to be subject to the
8 prohibition of § 441b.”

9 The Commission’s definition of express advocacy is set forth at 11 C.F.R. § 100.22. The
10 second part of this regulation encompasses a communication that, when taken as a whole or with
11 limited reference to external events, “could only be interpreted by a reasonable person as
12 containing advocacy of the election or defeat of one or more clearly identified candidate(s)
13 because” it contains an “electoral portion” that is “unmistakable, unambiguous, and suggestive of
14 only one meaning” and “reasonable minds could not differ as to whether it encourages actions to
15 elect or defeat one or more clearly identified candidate(s) or encourages some other kind of
16 action.”¹ 11 C.F.R. § 100.22(b). In explaining the potential reach of Section 100.22(b), the

¹ The Chamber argues that Section 100.22(b) is unconstitutional because it extends the definition of express advocacy beyond the “magic words” test set forth in *Buckley v. Valeo*, 424 U.S. 1 (1976) (“*Buckley*”) and is unconstitutionally vague. See Response, at pp. 5-6, 8-11. The first argument misconstrues *Buckley*, *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) (“*MCFL*”), and *McConnell v. FEC*, 540 U.S. 93 (2003) (“*McConnell*”), as none of those cases stand for the proposition that express advocacy must be limited to a finite set of magic words. In *Buckley*, the Court prefaced its list of examples with the phrase “such as,” demonstrating that the list is non-exhaustive. 424 U.S. at n.52. The Court in *MCFL* clarified that it did not intend wooden literalism to define express advocacy, and that the advocacy could be “marginally less direct” than “Vote for Smith,” as long as its “essential nature” was clear. *MCFL*, 479 U.S. at 249 (emphasis added). *McConnell*, although it did not address the validity of Section 100.22, discussed express advocacy principally to afford context in evaluating the constitutionality of an alternative standard for regulating communications that influence voters’ decisions. See *McConnell*, 540 U.S. 192-93. In doing so, *McConnell* explicitly stated that *Buckley* provided “examples of words of

1 Commission stated that “communications discussing or commenting on a candidate’s character,
2 qualifications or accomplishments are considered express advocacy under new section 100.22(b)
3 if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat
4 the candidate in question.” *Explanation and Justification for Regulations on Express Advocacy*,
5 60 Fed. Reg. 35292, 35295, July 6, 1995.

6 The Chamber’s message contains an unmistakable and unambiguous electoral portion
7 because it is specifically addressed to “absentee voters.” In addition, the automated telephone
8 call focuses on Rep. Case’s character, qualifications, and accomplishments in a manner that has
9 no other reasonable meaning than to encourage absentee voters to vote for Ed Case for Senator.
10 In addition to publicizing his support for tax cuts and small business health plans, the message
11 touts Rep. Case’s experience in the public and private sector as well as his experience in
12 Congress, where the Chamber claims that Rep. Case “has over twenty years of experience in both
13 the public and private sector, and he has fought hard and delivered on his promises,” and “has
14 made tough decisions that are right for Hawaii, even if it’s not popular with partisan politicians.”
15 These statements center on the candidate’s qualifications and accomplishments, not issues, and
16 are of the type contemplated when the Commission promulgated Section 100.22(b). Moreover,
17 the communication contains no other content except a request at the end for listeners to learn
18 more by visiting a website containing more information about Rep. Case and his primary

express advocacy .. and those examples *eventually* gave rise to what is now known as the ‘magic words’ requirement” 540 U.S. at 191, 124 S. Ct. at 687 (emphasis added) (internal citations omitted)

Section 100 22(b) is not unconstitutionally vague because the “reasonable person” standard provides an objective test that can be consistently applied. The standard is not based upon the sensitivity or interpretation of particular listeners, but focuses on the audience’s reasonable interpretation of the message. *See Explanation and Justification*, 60 Fed Reg 35,291, 35,295 (Jul. 6, 1995).

1 opponent. *See* MUR 5634 (Sierra Club) (tag-line to visit a web-site in “Conscience pamphlet
2 does not, in and of itself, create ambiguity as to the meaning of a communication).

3 Taken together, absentee voters receiving this message eight days before the primary
4 election could not differ as to whether or not it was urging electoral action to elect Rep. Case.
5 *See* MUR 5024R (Kean for Congress) (finding advertisement discussing character and
6 qualifications and “improving schools, keeping taxes low, fighting overdevelopment and
7 congestion” met the definition of express advocacy under Section 100.22(b)). Indeed, outside the
8 context of each candidacy, these telephone calls make little, if any, sense. This is particularly
9 true given that certain calls appear to have been made to absentee voters outside of Rep. Case’s
10 congressional district. Were Rep. Case not a candidate for U.S. Senate, it is unclear why anyone
11 outside of his own congressional district would find any use for the information.

12 In its response to the complaint, the Chamber argues against proceeding in this matter
13 because the reference to “absentee voters” in the automated message is permissible under the
14 Commission’s regulations regarding corporate funded voting communications, voting recordings,
15 or voter guides. This argument, however, misreads 11 C.F.R. §§ 114.4(c)(2), (4), and (5). The
16 regulations state that a corporation may prepare such materials so long as they do not expressly
17 advocate the election or defeat of any clearly identified candidate.² *See id.* Assuming without
18 deciding that the automated message constituted a voting communication, voting recording, or

² The Commission in MUR 5634 determined that a voter guide (the “Dirt” pamphlet) did not constitute express advocacy because the electoral portion, which directed readers to “Dig deeper for facts about the candidates for president” was not “suggestive of only one meaning.” *See* MUR 5634 (GCR #1), at 8. The automated phone call at issue here, however, contains an unmistakable electoral portion by referring directly to absentee voters. In addition, the Dirt pamphlet was a voter guide that set forth the 2004 presidential candidates’ views on environmental issues without referring to their character, qualifications, or accomplishments, *see id.*, whereas the automated telephone call at issue here discusses both Rep. Case’s voting record as well as his character, qualifications, and accomplishments.

1 voter guide, the Chamber's argument pre-supposes that the automated call does not expressly
2 advocate the election or defeat of a clearly identified candidate.³

3 **b. ADEQUACY OF DISCLAIMER**

4 Whenever a person makes a disbursement that is not authorized by a candidate or the
5 candidate's authorized committee for the purpose of financing public communications expressly
6 advocating the election or defeat of a clearly identified candidate, the communication must
7 include the name and permanent street address, telephone number or World Wide Web address
8 of the person who paid for the communication and state that the communication is not authorized
9 by any candidate or candidate's committee." 2 U.S.C. § 441d(a)(3); 11 C.F.R. § 110.11. A
10 public communication includes a communication by telephone bank to the general public. 11
11 C.F.R. § 100.26. A telephone bank means that more than 500 calls of an identical or
12 substantially similar nature were made within a 30-day period. 11 C.F.R. § 100.28.

13 The Chamber's automated telephone call included a disclaimer that it was "[p]aid for by
14 the U.S. Chamber of Commerce," but did not include the Chamber's street address, telephone
15 number, or Web address, and did not state that the message was not authorized by a candidate or
16 candidate's authorized committee.

³ The Chamber's response also argues that two news articles and a web comment discussing the automated message demonstrate that it did not have one unmistakable meaning. See Response, at pp. 12-13. The articles, however, simply describe the legal issue in this matter, and do not analyze whether or not reasonable minds could agree that the automated telephone call encourages actions to elect Rep. Case to the U.S. Senate or encourages some other kind of action. See Derrick DePledge, *FEC to investigate calls for Case*, Honolulu Advertiser (Sept. 19, 2006) (Attachment 2), Jerry Burris, *Awkward campaign bumps could unhinge Case's efforts*, Honolulu Advertiser (Sept. 20, 2006) (Attachment 3). Similarly, the comment posted on the Honolulu Advertiser Discussion Board stating that voters did not support Rep. Case because of the positions mentioned by the Chamber in the automated call (see Response, at p. 13) does not impact our analysis that the communication expressly advocated the election of Rep. Case because the fact that some of the recipients disagreed with the views expressed in the communication is not part of the express advocacy test.

1 **III. CONCLUSION**

2 Because the automated telephone call expressly advocates the election of Rep. Ed Case to
3 the U.S. Senate,⁴ the Commission finds reason to believe that the United States Chamber of
4 Commerce violated 2 U.S.C. § 441b(a). In addition, because the automated telephone call did
5 not provide the Chamber's permanent street address, telephone number or World Wide Web
6 address and did not state that the communication was not authorized by any candidate or
7 candidate's committee, the Commission also finds reason to believe that the U.S. Chamber of
8 Commerce violated 2 U.S.C. § 441d(a)(3).

⁴ Respondent's argument that the complaint should be dismissed because it did not receive proper notice does not prevail. Although Respondent did not receive notice of the complaint within the statutory period, the Commission cured the oversight in a timely manner. *See FEC v Club for Growth*, Civ. Action No. 05-1851 (D.D.C.) (denying motion to dismiss stating failure to provide proper notice was harmless error)

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